

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

THOMAS ADAM HENDERSON,

Plaintiff,

v.

DECISION AND ORDER
14-CV-445A

ANTHONY ANNUCCI, et al.,

Defendants.

The above-referenced case was referred to Magistrate Judge Jeremiah J. McCarthy pursuant to 28 U.S.C. § 636(b)(1)(B). On March 14, 2016, Magistrate Judge McCarthy filed a Report, Recommendation, and Order (Dkt. No. 39), recommending that defendants' motion to dismiss (Dkt. No. 22) be granted as to (1) plaintiff's claim against defendant Dunford related to the September 10, 2013 incident; and (2) plaintiff's supervisory claims against defendants Annucci, Fonda, Bradt and Hughes. Magistrate Judge McCarthy also recommended that the defendants' motion to dismiss be denied as to plaintiff's claims against defendants Nabb and Hoinski.

Magistrate Judge McCarthy further ordered that plaintiff's motion to amend the Complaint (Dkt. No. 31) be granted to the extent that plaintiff may assert that he has exhausted administrative remedies regarding the October 22, 2013 incident involving defendant Hoinski, but plaintiff may not assert any previously dismissed claims. Magistrate Judge McCarthy ordered that the plaintiff's motion to amend is otherwise denied. Finally, Magistrate Judge McCarthy ordered that plaintiff's motion for appointment of counsel (Dkt. No. 32) be denied.

On March 30, 2016, plaintiff filed objections to the Report and Recommendation. Dkt. No. 40. Defendants filed a response on April 20, 2016 (Dkt. No. 42). The plaintiff also filed a reply brief “request[ing] leave of the Court to correct the record before the Court.” Dkt. No. 44 (capitalization modified).

Pursuant to 28 U.S.C. §636(b)(1), this Court must make a *de novo* determination of those portions of the Report and Recommendation to which objections have been made. The plaintiff’s primary objection is to Magistrate Judge McCarthy’s conclusion that DOCCS’s revision to Directive 4040 does not apply retroactively. See Dkt. No. 39 at 13. As Magistrate Judge McCarthy observed, “[a]s a general rule, a new statutory provision does not apply retroactively to conduct that occurred prior the provision’s enactment.” *Id.* “A similar rule applies to [state] administrative regulations,” such as Directive 4040. *Rudin Mgmt., Inc. v. Comm’r, Dep’t of Consumer Affairs of City of New York*, 213 A.D. 2d 185, 185 (First Dep’t 1995). There is an exception to this rule for remedial, rights-creating regulations (see *id.* at 186), but the exception does not apply in this case. Revised DOCCS Directive 4040 does not create new rights; rather, it merely modifies the procedures a prisoner must follow to attempt to vindicate already-existing constitutional rights. Thus, it is clear that revised DOCCS Directive does not apply retroactively. The Court accordingly adopts Magistrate Judge McCarthy’s Report and Recommendation in its entirety. Further, to the extent that the plaintiff objects to Magistrate Judge McCarthy’s non-dispositive orders, pursuant to 28 U.S.C. § 636(b)(1)(A), the Court affirms Magistrate Judge McCarthy’s orders.

Accordingly, for the reasons set forth in Magistrate Judge McCarthy’s Report,

Recommendation, and Order (Dkt. No. 39), defendants' motion to dismiss (Dkt. No. 22) is granted in part and denied in part, plaintiff's motion to amend (Dkt. No. 31) is granted in part and denied in part, and plaintiff's motion for appointment of counsel (Dkt. No. 32) is denied.

The case is referred back to Magistrate Judge McCarthy for further proceedings.

IT IS SO ORDERED.

Richard J. Arcara

HONORABLE RICHARD J. ARCARA
UNITED STATES DISTRICT COURT

Dated: May 27, 2016